

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ALEX LUNA,

Plaintiff,

v.

ERIKA FENSTERMAKER, et. al.,

Defendants.

CIVIL ACTION NO. 3:12-CV-2476

(Judge Kosik)

MEMORANDUM AND ORDER

AND NOW, this 7th day of January, 2013, IT APPEARING TO THE
COURT THAT:

(1) Plaintiff, Alex Luna, a prisoner confined at USP- Canaan, Pennsylvania, filed the instant Bivens civil rights action and Federal Tort Claims Act ("FTCA") action on December 11, 2012;

(2) In his Complaint, Plaintiff raises an Eighth Amendment cruel and unusual punishment claim and negligence claim on the part of the prison in the preparation and service of food;

(3) The action was assigned to Magistrate Judge Martin C. Carlson for Report and Recommendation;

(4) On December 12, 2012, the Magistrate Judge issued a Report and Recommendation (Doc. 5) wherein he recommended that the Plaintiff's Motion for Leave to Proceed in forma pauperis be granted; that Plaintiff's Complaint be dismissed as to the individual Defendant, and that the Plaintiff's complaint be served on the United States;

(5) Specifically, the Magistrate Judge found that the Plaintiff failed to allege personal involvement of the individual Defendant, Ms. Fenstermaker, and that the United States is the proper Defendant in an FTCA case;

(6) Plaintiff has failed to file timely objections to the Magistrate Judge's Report and Recommendation;

AND, IT FURTHER APPEARING THAT:

(7) If no objections are filed to a Magistrate Judge's Report and Recommendation, the plaintiff is not statutorily entitled to a de novo review of his claims. 28 U.S.C.A. §636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 150-53 (1985). Nonetheless, the usual practice of the district court is to give "reasoned consideration" to a magistrate judge's report prior to adopting it. Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987);

(8) We have considered the Magistrate Judge's Report and we concur with his recommendation. After reviewing the Complaint, we find that Plaintiff failed to set forth any personal involvement of Ms. Fenstermaker, and that the United States is the proper party Defendant for Plaintiff's FTCA claim;

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

(1) The Report and Recommendation of Magistrate Judge Martin C. Carlson dated December 12, 2012 (Doc. 5) is **ADOPTED**;

(2) The Plaintiff's Motion for Leave to Proceed in forma pauperis (Doc. 2) is **GRANTED**;

(3) The Plaintiff's claim is **DISMISSED** as to Defendant, Fenstermaker, but the FTCA claim against the United States is allowed to proceed; and


(4) The Clerk of Court is directed to **REMAND** this action to the Magistrate Judge for further proceedings.

FILED
SCRANTON

JAN 07 2013

PER

DEPUTY CLERK


Edwin M. Kosik

United States District Judge